SWANN et al. *v.* WASHINGTON-SOUTHERN RY. CO.

June 11, 1908.

[61 S. E. 750.]

1. Appeal and Error—Assignments of Error—Insufficient Presentation.—Assignments of error affected by extraneous evidence, and not made the subject of exception or bill of exception in the trial court, are not available on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1432.]

2. Eminent Domain—Easements Subject to Condemnation.—Under Code 1904, § 1105f (3)-(6), authorizing the condemnation of "lands or any interest or estate therein, or materials or other property," an easement of right of way is subject to condemnation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 104.]

3. Same—Commissioners' Report.—Where, in a condemnation proceeding, the commissioners' report fixed defendants' damages at $5,100, "if no other way is provided by the railway company as a substitute for those condemned, or at $3,000 if the company shall furnish such other way," the circuit court properly rejected so much of the report as contemplated the possible establishment of a new right of way as surplusage, and adopted and confirmed the $5,100 award unconditionally; the report not being rendered void by its alternative feature.

4. Same.—In a condemnation proceeding, it was beyond the commissioners' and the court's jurisdiction to take cognizance of property rights of strangers in title to defendants and their property, they not being parties to the proceeding, and to make their separate and distinct holdings the subject of a joint award; the provision of Code, § 1105f (14), for a reference to enable the court to properly dispose of money paid into court upon an award of commissioners, and for an ascertainment as to who are entitled to the fund and in what proportions, applying to funds in which there is a community of interest among the claimants.

TAZEWELL et al. *v.* HERMAN, Treasurer.

June 16, 1908.

[61 S. E. 752.]

Appeal and Error—Rehearing.—A rehearing will not be granted for the purpose of passing on a question which was not involved in the case, was not argued by counsel for defendant in error, and was not considered or passed on by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3221.]

On petition for rehearing. Petition denied.

For former opinion, see 60 S. E. 767.

STUART et al. *v.* R. C. HOFFMAN & CO. et al.

June 11, 1908.

[61 S. E. 757.]

1. Costs—Persons Liable—Attorneys' Fees—Payment from Fund in Court.—Where parties to a suit, unrepresented by counsel, reap the benefit of services rendered in the progress of a cause, it is proper that those who receive the benefit should be required to make just compensation; but, except in rare instances, the power of the court to require one party to contribute to the fees of counsel of another party must be confined to cases where plaintiff suing in behalf of himself and others of the same class discovers or creates a fund which inures to the common benefit of all, and a fee is properly allowed where the services of counsel have preserved a fund to be shared in with those in like interest and unrepresented by counsel.

2. Same.—An insolvent and its receiver were represented by counsel in suits to establish liens against the insolvent. After a decision in favor of one lien claimant, the attorneys of other lien claimants and of the insolvent and of the receiver appealed, and the lien claimant was defeated. The attorneys of the other claimants sought to recover for their services payable out of the fund secured for the benefit of all creditors. By arrangement between the attorneys of the various parties, the attorneys of the other lien claimants argued the cause on appeal, though the other counsel were ready and able to support the appeal. Held, that the attorneys of the other lien claimants were entitled to fees payable out of such fund.

NORFOLK RY. & LIGHT CO. *v.* HIGGINS.

June 11, 1908.

[61 S. E. 766.]

1. Negligence—Contributory Negligence—Children—Instructions.—In case of injury of a boy between 11 and 12 years old, the jury should be plainly instructed that, being under the age of 14 but over 7 years of age, he was to be presumed incapable of contributory negligence, but the presumptions might be overcome by the evidence and circumstances of the case tending to prove his maturity and capacity; and an instruction that such presumption might be overcome by evidence that he had "more than the average capacity of children